Supreme Court U.S.
FILED
APR 27 2006
OFFICE OF THE CLERK

No. 05-051380

IN THE

Supreme Court of the United States

TIFFANY WILLIAMS,

Petitioner,

v.

MARION JACKSON and JOHN HAMMONDS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Georgia foster parents who allow their thirty-two year old, biological son, who has previous convictions for sexual abuse and armed robbery and who is abusing crack cocaine, to live in the basement of their home along with their thirteen year old foster daughter act under the color of state law for purposes of 42 U.S.C. § 1983 when the foster parents have been screened, trained and certified as foster parents by the State of Georgia, their home is certified as a foster home by the State of Georgia, the State places foster children in the home on long term bases and on short term bases, the State reimburses the foster parents for the foster children's basic living expenses, State employees visit the foster home in order to supervise the foster children residing therein, the State has a statutorily pronounced mission to safeguard Georgia's children through a program of child welfare and youth services, including foster care, the State entered into a Consent Decree requiring the State to implement and maintain certain procedures designed to protect foster children, and the Georgia Tort Claims Act expressly defines foster parents as "state employees," thereby providing foster parents with sovereign immunity from tort claims.

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Tiffany Williams respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is not reported. (*See* App., at 1a) The opinion and order of the district court were not reported. (*See* App., at 3a.)

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on January 27, 2006. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial

> capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

O.C.G.A. § 50-21-22 provides, in pertinent part:

> As used in this article, the term:
>
> (1) "Claim" means any demand against the State of Georgia for money only on account of loss caused by the tort of any state officer or employee committed while acting within the scope of his or her official duties or employment.
>
> * * * *
>
> (7) "State officer or employee" means an officer or employee of the state, elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of the state in any official capacity, whether with or without compensation, but the term does not include an independent contractor doing business with the state. The term state officer or employee also includes any natural person who is a member of a board, commission, committee, task force, or similar body established to perform specific tasks or advisory functions, with or without compensation, for the state or a state government entity, and any natural person who is a volunteer

> participating as a volunteer, with or without compensation, in a structured volunteer program organized, controlled, and directed by a state government entity for the purposes of carrying out the functions of the state entity. This shall include any health care provider and any volunteer when providing services pursuant to Article 8 of Chapter 8 of Title 31. An employee shall also include foster parents and foster children. Except as otherwise provided for in this paragraph, the term shall not include a corporation whether for profit or not for profit, or any private firm, business proprietorship, company, trust, partnership, association, or other such private entity.

O.C.G.A. § 50-21-25 provides, in pertinent part:

> (a) This article constitutes the exclusive remedy for any tort committed by a state officer or employee. A state officer or employee who commits a tort while acting within the scope of his or her official duties or employment is not subject to lawsuit or liability therefor. However, nothing in this article shall be construed to give a state officer or employee immunity from suit and liability if it is proved that the officer's or employee's conduct was not within the scope of his or her official duties or employment.
>
> (b) A person bringing an action against the state under the provisions of this article must name as a party defendant only the state government entity for which the state officer or employee was acting and shall not name the state officer or employee

> individually. In the event that the state officer or employee is individually named for an act or omission for which the state is liable under this article, the state government entity for which the state officer or employee was acting must be substituted as the party defendant.

STATEMENT OF THE CASE

Petitioner was sexually abused by Respondents' thirty-two year old, biological son while residing in Respondents' foster home. Respondents knew that their son had previous convictions for sexual abuse and armed robbery. In addition, the son was actively abusing crack cocaine during the pertinent time frame. Respondent Hammonds suspected that his son was abusing illegal drugs while he resided in Respondents' home. Nevertheless, Respondents permitted their son to reside in their home while they had several female foster children in their care. Moreover, Respondents placed Petitioner in a bedroom located in the basement of their home and allowed their son to occupy another bedroom in the basement.

Petitioner became pregnant as a result of Respondents' son sexually abusing her. The abuse was discovered after Petitioner became pregnant. Respondents' son was arrested and pled guilty to charges stemming from the sexual abuse. Respondents' son also pled guilty to an unrelated murder and is currently serving a life sentence in a Georgia state penitentiary.

The State's Foster Care System.

The State of Georgia has promulgated a statutory and regulatory scheme the purpose of which is to "promote, safeguard, and protect the well-being and general welfare of children and youth of th[e] state through a comprehensive and coordinated program of public child welfare and youth services. . . ." O.C.G.A. § 49-5-2. The Eleventh Circuit Court of Appeals has described Georgia's statutory scheme as "more than just 'procedural guidelines' to be followed in arriving at decisions." *Taylor v. Ledbetter*, 818 F.2d 791, 799 (1987). Rather,

> [t]he Georgia foster care and placement scheme is a comprehensive one. . . . The law governing the licensing of child placement agencies clearly mandates that the [Georgia] Department of Human Resources 'in placing children in foster family homes, shall safeguard the welfare of such children by thoroughly investigating each such home and the character and reputation of the persons residing therein and shall adequately supervise each home during the period of care. . . . It shall be the duty of the department to inspect at regular intervals all licensed child welfare agencies within the state including . . . foster family homes. . . ."

Id. (citing O.C.G.A. § 49-5-1291 (m)).

Moreover, State regulations governing foster care services require that the selection of a foster home should be based upon how well the home will meet the needs of the child. The regulations also require the State to supervise

children in foster homes "through visits made at regular intervals and as frequently as necessary for the best interest of the child." *Id.* (citing O.C.R.R.G. § 290-2-12-08)). "Thus, the Georgia scheme mandates that State officials follow guidelines and take affirmative actions to ensure the well being and promote the welfare of children in foster care." *Id.*

In addition to the foregoing statutes and regulations, as part of a settlement in *Taylor*, the Georgia Department of Human Resources ("DHR") entered into a "Consent Decree," in which the DHR agreed to implement certain practices and procedures to help the Department protect children in foster care. These procedures relate to (1) the approval of foster homes, (2) the pre-placement preparation of foster children and the foster parents, (3) the supervision of foster children while in foster homes, (4) investigations of suspected abuse and neglect, and (5) medical care for foster children.

Furthermore, through the Georgia Tort Claims Act ("GTCA"), the State has statutorily defined foster parents as "state employees." *See* O.C.G.A. § 50-21-22 (7). In doing so, the State has granted foster parents total immunity for torts committed during the course of their duties as foster parents. *See* O.C.G.A. § 50-21-25 (a) (providing state employees immunity for torts committed while acting in the scope of their official duties). Conversely, the State has legislatively waived the State's sovereign immunity for torts committed by foster parents. The State's waiver of sovereign immunity, however, is subject to several exceptions, including an exception for "losses resulting from . . . [a]ssault, [and] battery. . . ." *See* O.C.G.A. § 50-21-24 (7). A claim arising out of a sexual assault falls within this exception, even if the state employee being sued was not

the perpetrator of the assault. *See Ga. Military Coll. v. Santamorena*, 237 Ga. 58 (1999). Thus, the State has not waived its sovereign immunity for claims arising from the physical and/or sexual abuse of foster children.

Respondents' Role And Function Within The State's Foster Care System.

Respondents began the process of becoming certified to act as foster parents through the Clayton County Division of Family and Children's Services ("DFACS") in 1997. As part of the process, Respondents attended ten weeks of classes taught by DFACS employees. In addition, DFACS "screened" Respondents and ultimately certified Respondents to serve as foster parents. Subsequently, DFACS began placing children in Respondents' home. In addition to placing foster children in Respondents' home on a long term basis, DFACS also had Respondents provide short term care for children who were awaiting court appearances. The State reimbursed Respondents for money Respondents spent providing food, clothing and shelter to the foster children in their care.

DFACS caseworkers visited Respondents' home to supervise the foster children residing therein. Further, the State investigated claims of abuse within the home. Specifically, while Petitioner was residing in Respondents' home, DFACS received a report of sexual misconduct involving Respondents' biological grandson and another foster child residing in Respondents' home. DFACS investigated this report but allowed Petitioner to remain in the home.

The District Court Proceedings.

Petitioner filed the present action in the United States District Court for the Northern District of Georgia on March 25, 2004. Petitioner filed the suit through her biological mother because she was a minor at the time she initiated the litigation. Petitioner has since reached the age of majority.

Petitioner sued Respondents and three employees of the Clayton County DFACS under 42 U.S.C. § 1983, alleging that the defendants had violated her Fourteenth Amendment substantive due process rights. Petitioner also alleged state law claims against Respondents' son, Montaque Jackson. During the course of the underlying litigation, Petitioner dropped her claims against two of the three DFACS employees originally named in the suit. Thereafter, Respondents and the DFACS employee remaining in the case, Stacy Reed, filed separate motions for summary judgment.

Respondents moved for summary judgment on several bases. Respondents argued that they cannot be held liable for any of the constitutional violations alleged because they are not State actors under 42 U.S.C. § 1983. In support of this argument, Respondents relied heavily upon *Rayburn v. Hogue*, 241 F.3d 1341 (11th Cir. 2001), in which the Eleventh Circuit held that the defendant-foster parents in that case were not State actors under the nexus/joint action test. Respondents also argued that, to the extent Petitioner was alleging any state law claims against them, they were entitled to summary judgment because the Georgia Tort Claims Act bars such claims against them.

In response, Petitioner clarified that she was not asserting any state law claims against Respondents. As to the claims under 42 U.S.C. § 1983, Petitioner argued that Respondents were state actors under the standards articulated in this Court's decisions in *West v. Atkins*, 487 U.S. 42 (1988) and *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n.*, 531 U.S. 288 (2001) (hereinafter "*Brentwood Academy*").

Specifically, Petitioner argued that, under *West*, Respondents are public employees acting under color of state law because of their relationship with the State and their function within the foster care system, regardless of the precise terms of their employment by the State.

Petitioner also argued that, even if Respondents are private persons, they are state actors under the "entwinement test" applied in *Brentwood Academy*. Petitioner argued that Respondents were entwined with Georgia's foster care system and the State was entwined with the management and control of Respondents' foster home.

Finally, Petitioner argued that the Eleventh Circuit decision in *Rayburn* was not inconsistent with a finding of state action under *West* and/or *Brentwood Academy* because in *Rayburn* the court did not address either of those cases. Instead, the *Rayburn* court held only that the defendants in that case were not state actors under the nexus/joint action theory of state action.

The district court rejected Petitioner's arguments and found that Respondents were not state actors. On August 30, 2005, United States District Court Judge Julie Carnes issued a single order granting Respondents' motion and defendant Stacy Reed's motion. On August 31, 2005, the district court entered judgment in favor of Respondents.

The Eleventh Circuit's Opinion.

Petitioner appealed. On January 27, 2006, the Eleventh Circuit Court of Appeals affirmed the district court's order.

The result of the Eleventh Circuit's ruling is that Georgia's foster children are left without any recourse to pursue civil claims against foster parents for damages arising out of physical and/or sexual abuse. This is because the Georgia Tort Claims Act provides foster parents with sovereign immunity against state law actions and the Eleventh Circuit's decision immunizes foster parents from claims under federal civil rights law.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari in this case for three reasons. First, the Eleventh Circuit's decision in this case conflicts with this Court's decision in *West*. Second, the Eleventh Circuit's decision conflicts with this Court's decision in *Brentwood Academy*. Third, the underlying decision denies justice to Georgia's most vulnerable citizens while eliminating an important deterrent to child abuse.

A. The Eleventh Circuit's Decision Conflicts With This Court's Decision In *West*.

In *West*, a state prison inmate brought a Section 1983 claim against a physician who had treated the prisoner at Central Prison Hospital in North Carolina. 487 U.S. at 43-44. The plaintiff claimed that the physician was deliberately indifferent to his medical needs. *Id.* at 45.

The defendant-physician, who maintained a private practice, provided services at the prison hospital on a part-time basis under a "Contract for Professional Services" with the State of North Carolina. *See id.* at 44, n.1. The defendant argued that he could not be liable under Section 1983 because he was an independent contractor. This Court rejected the argument and explained as follows:

> [S]tate employment is generally sufficient to render the defendant a state actor. [Cit.] It is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given him by the State. [Cit.] Thus, generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law. [Cit.]
>
> * * * *
>
> By virtue of his relationship, effected by state law, [Defendant] is authorized and obliged to treat prison inmates, such as [Plaintiff]. He does so clothed with the authority of state law. [Quotation omitted.]
>
> * * * *
>
> The fact that the State employed respondent pursuant to a contractual agreement that did not generate the same benefits or obligations applicable to other "state employees" does not alter the analysis. It is the physician's function within the state system, not the precise terms of

> his employment, that determines whether his actions can fairly be attributed to the State. Whether a physician is on the state payroll or is paid by contract, the dispositive issue concerns the relationship among the State, the physician, and the prisoner.

Id. at 49-57.

In the present case, the relationship between the State of Georgia, Respondents, and Petitioner was such that Respondents' actions can fairly be attributed to the State. Specifically, as discussed above, the State of Georgia has undertaken a mission to protect the children of the State of Georgia through a comprehensive and coordinated program of public child welfare and youth services. *See* O.C.G.A. § 49-5-2; *see also Taylor*, 818 F.2d at 798-800 (discussing Georgia's statutory scheme governing foster care). As certified foster parents, Respondents were in a relationship of cooperation with the State of Georgia and assumed obligations to further and promote the State's mission. *See Taylor*, 818 F.2d at 798-800; *see also* O.C.R.R.G. § 290-2-12-.08.

Respondents were trained, screened, certified and supervised by the State. They also received monetary reimbursement from the State for expenses incurred in caring for Petitioner. In addition, the State has statutorily defined Respondents as "state employees," *see* O.C.G.A. § 50-21-22 (7), thereby providing Respondents with the valuable benefit of sovereign immunity – a benefit Respondents invoked in this case. *See* O.C.G.A. § 50-21-25(a).

As in *West*, the precise terms of the Respondents' contractual relationship with the State is not determinative of whether Respondents are "public employees." Rather, the dispositive issue here concerns the relationship among the State, the Respondents, and Petitioner. *See West*, 487 U.S. at 57. In this case, the district court and the Eleventh Circuit failed to consider the nature of the relationship among the parties. Instead, the district court simply stated that foster parents are "private parties." (App., at 21a). The court went on to state that the Petitioner "has not cited any case law to justify disturbing this assumption." (App., at 21a). In so stating, the court ignored Petitioner's reliance upon *West*.

B. The Eleventh Circuit's Decision Conflicts With This Court's Decision In *Brentwood Academy*.

In *Brentwood Academy*, the issue before the Court was "whether a statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools may be regarded as engaging in state action when it enforces a rule against a member school." 531 U.S. at 290. The defendant-association was a private corporation. *Id.* at 291. The corporation was not created by the State of Tennessee and was not funded by the State. *See id.* at 936 (Thomas, J., dissenting). The plaintiff was a private high school which the association had punished for violating a recruiting rule. *Id.* at 293.

The Court explained that whether action taken by a private person is fairly attributable to the State is "a matter of normative judgment, and the criteria lack rigid simplicity." *Id.* at 296. The Court then identified several factors that can lead to attributing private conduct to the State. *See id.* Among

such factors, is the "entwinement" of the nominally private entity with government policies or government management and control. *See id.*

The "entwinement test" announced in *Brentwood Academy* is a theory for attributing state action to a private party that is different from the state compulsion test, the public function test, or the nexus/joint action test. *See id.* at 311 (Thomas, J. dissenting). Justice Thomas stated:

> We have never [before] found state action based upon mere 'entwinement.' Until today, we have found a private organization's acts to constitute state action only when the organization performed a public function; was created, coerced, or encouraged by the government; or acted in a symbiotic relationship with the government.

Id. at 305. Based on this new test, a majority of the Court held that the association's actions constituted state action. *Id.* at 933.

In this case, the district court did not agree that *Brentwood Academy* creates a new test. Instead, the district court found that the *Brentwood Academy* actually applied the "nexus/joint action test." (App. B., at 23.) In addition, the district court failed to heed this Court's instruction that the test for State action is "a matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood Academy*, 531 U.S. at 296. Despite this language, the district court insisted upon a rigid application of the Eleventh Circuit's "three test system." (App. B, at 24.)

Under the standard announced in *Brentwood Academy*, Respondents' conduct constitutes State action. As in *Brentwood Academy,* significant entwinement exists both from the "top down" and from the "bottom up." *See Brentwood Academy*, 531 U.S. at 300.

Specifically, through its statutory and regulatory scheme, as well as the Consent Decree entered in *Taylor*, the State has provided for entwinement from the "top down." *See* O.C.G.A. § 49-5-2; *Taylor*, 818 F.2d at 799 (citing O.C.G.A. § 49-5-129l (m) and O.C.R.R.G. § 290-2-12-08)). In this regard, the DHR, through DFACS workers, screened, trained, and supervised Respondents in their role as certified foster parents, supervised numerous foster children residing in Respondents' home, investigated reports of sexual misconduct occurring inside the home, and compensated Respondents for expenses incurred in caring for Petitioner. Furthermore, as discussed above, through the GTCA, the State has statutorily defined foster parents as "state employees" and granted foster parents total immunity for torts committed during the course of their duties as foster parents. *See* §§ 50-21-22 (7) and 50-21-25 (a).

Respondents were also entwined with the State from the "bottom up." Respondents received training from the State prior to becoming licensed as foster parents, received funds from the State, and asserted official immunity for any state law torts that they have committed.

In sum, Respondents were entwined with Georgia's foster care system and the State was entwined with the management and control of the Respondents' foster home. Therefore, Respondents' conduct should be deemed to be state action.

C. The Decision Below Will Have Severe Adverse Consequences For Georgia's Most Vulnerable Citizens.

The legislative history of § 1983 demonstrates that it was particularly intended to protect those persons who are being deprived of their constitutional rights and are without recourse under state laws. *See Monroe v. Pape*, 365 U.S. 167, 172-183, (1961), *rev'd on other grounds Monell v. Dep't of Social Servs. of the City of New York*, 436 U.S. 658 (1978). As discussed above, Georgia foster children who are the victims of physical and/or sexual abuse are unable to pursue civil suits against their foster parents under state law because the foster parents are clothed with sovereign immunity. In addition, while the State of Georgia has waived its sovereign immunity for torts committed by state employees, including foster parents, the waiver does not apply to claims arising from any type of assault and/or battery. Thus, Georgia foster children who are physically and/or sexually abused must look to federal civil rights laws for protection.

Under the decision below, however, Georgia's most vulnerable citizens are denied the protection of federal civil rights laws. The Third Circuit has described the situation in which foster parents hide behind sovereign immunity to avoid liability on state law claims while simultaneously arguing that they are not "state actors" for Section 1983 purposes as a "heads-we-win-tails-you-lose" scenario. *Leshko v. Servis*, 423 F.3d 337, 342 (3rd Cir. 2005) (following *Rayburn* and finding that foster parents are not state actors for purposes of Section 1983 liability). This unjust situation provides a compelling basis for this Court to grant certiorari in this case.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED JANUARY 27, 2006

No. 05-15417
Non-Argument Calendar

D.C. Docket No. 04-00838-CV-JEC1

Appeal from the United States District Court
for the Northern District of Georgia

January 27, 2006

TIFFANY WILLIAMS, a minor by her next friend,
PRISCILLA S. WILLIAMS

Plaintiffs-Appellants,

v.

STACY REED, MARY JENKINS, AWALDI ELLIOT,
MONTAQUE JACKSON, MARION JACKSON, *et al.*,

Defendants-Appellees,

MARY ANN JACKSON, JAMES JACKSON,

Defendants.

Appendix A

Before TJOFLAT, MARCUS and WILSON, Circuit Judges,

PER CURIAM:

In an order entered on August 30, 2005, the district court granted summary judgment in favor of appellees Marion Jackson and John Hammonds and dismissed Appellant's claim against Montaque Jackson because Appellant had abandoned her claim against him. Appellant now challenges those rulings.

The district court's August 30 order constitutes a proper application of the controlling law to the material facts in this case. We therefore affirm the court's judgment.

AFFIRMED.

A True Copy - Attested
Clerk U.S. Court of Appeals
Eleventh Circuit

By: _____
Deputy Clerk
Atlanta, Georgia

APPENDIX B — ORDER IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION DATED AUGUST 30, 2005

Civil Action No. 1:04-CV-0838-JEC

August 30, 2005

TIFFANY WILLIAMS, a minor, by her next friend, PRISCILLA WILLIAMS

Plaintiff,

v.

STACY REED, *et al.*,

Defendants.

ORDER

This case is presently before the Court on Marion Jackson and John Hammonds' Motion for Summary Judgment [59]; defendants' Marion Jackson and John Hammonds' Request for Oral Argument [60]; Consent Motion by Defendants Reed, Jenkins, and Elliot for Extension of Time in Which to File Their Notion for Summary Judgment [66]; Defendants Marion Jackson and John Hammonds' Motion to Strike and Objections to the Affidavit of Dawn Tyus [67]; Consent Motion to Drop Defendant Awaldi Elliot [71]; Defendants Reed and Jenkins' Motion for Summary Judgment [80]; AND Plaintiff's Motion to Drop Defendant Mary Jenkins [110]. The Court has

reviewed the record and the arguments of the parties and, for the reasons set out below, concludes that Marion Jackson and John Hammonds' Motion for Summary Judgment [59] should be **GRANTED**; defendants' Marion Jackson and John Hammonds' Request for Oral Argument [60] should be **DENIED**; Consent Motion by Defendants Reed, Jenkins, and Elliot for Extension of Time in Which to File Their Motion for Summary Judgment [66] should be **GRANTED**; Defendants Marion Jackson and John Hammonds' Motion to Strike and Objections to the Affidavit of Dawn Tyus [67] should be **DENIED**; Consent Motion to Drop Defendant Awaldi Elliot [71] should be **GRANTED**; Defendants Reed and Jenkins' Motion for Summary Judgment [80] should be **GRANTED**; AND Plaintiff's Motion to Drop Defendant Mary Jenkins [110] should be **GRANTED**.

BACKGROUND

I. Factual Background

Plaintiff, Tiffany Williams, is a minor currently in the custody of Clayton County Department of Family and Children Services ("DFCS"). By and through her next friend and biological mother, Priscilla Williams,[1] plaintiff filed this civil action under 42 U.S.C. § 1983, claiming that events which

1. As Priscilla Williams' parental rights to plaintiff Tiffany Williams have now been permanently terminated, as a result of Ms. Williams' own demonstrated unfitness as a parent, the Court questions the propriety of her bringing this suit--and controlling any monies awarded as damages. (*See* Priscilla Dep. at 141, 143-44.) As this Court has granted all defendants' motions for summary judgment, however, the matter appears moot.

occurred during plaintiff's September 2000 through May 2001 placement in the foster home of defendants Marion Jackson and John Hammonds violated her Fourteenth Amendment substantive due process rights. (Mem. of Law in Supp. of Defs. Marion Jackson and John Hammonds' Mot. for Simm. J. ("J&H Mot. for Simm. J.") [59] at 2.) Specifically, plaintiff alleges that the adult son of her common-law married foster parents, Montaque Jackson, engaged in repeated sexual intercourse with the plaintiff during the time she was assigned to Ms. Jackson and Mr. Hammonds' foster home. (*Id.*) As a result of the sexual relationship between plaintiff and Mr. Jackson, sometime during the spring or summer of 2001, plaintiff became pregnant. (Defs. Reed and Jenkins' Statement of Material Facts Not Genuinely in Issue ("RJSMF") [80] at ¶¶ 28-29.) At the time she became pregnant, plaintiff was just thirteen or fourteen years old.[2] (Dep. of Tiffany Williams, November 17, 2004 ("Tiffany Dep.") [63]

2. Plaintiff was born April 30, 1987. Thus, if she was impregnated before April 30, 2001, plaintiff would have been thirteen-years-old. However, the record is not clear as to when exactly plaintiff became pregnant with Mr. Jackson's child. Plaintiff's daughter was born sometime in December of 2001. Though plaintiff moved out of the Jackson/Hammonds foster home in May 2001, plaintiff requested to, and did, return to the Jackson/Hammonds foster home for an overnight visit in June 2001. (RJSMF at ¶ 27.) During that June 2001 visit, plaintiff and Mr. Jackson engaged in sexual intercourse and plaintiff told Mr. Jackson that she thought she was pregnant. (RJSMF at ¶ 27; Tiffany Dep. at 303.) Plaintiff's pregnancy was not confirmed by a medical doctor until July or August of 2001. (Tiffany Dep. at 172.) At that time, the doctor estimated plaintiff to be four months pregnant. (*Id.*) Plaintiff then gave birth to a premature infant in December 2001. (Priscilla Dep. at 122.) Taking all this together, the Court is still unable to determine whether plaintiff became pregnant with Mr. Jackson's child before or after her fourteenth birthday.

at 6.) Mr. Jackson was thirty-two years old. (Dep. of Priscilla Williams, December 1, 2004 ("Priscilla Dep.") [102] at 115.) Plaintiff gave birth to her daughter, Tianna Williams, sometime in December of 2001. (Tiffany Dep. at 294.) Like plaintiff, Tianna is a minor currently in the custody of DFCS. She is assigned to the same foster home as plaintiff, her mother. (*Id.* at 214.)

The parties to this action do not contest the fact that plaintiff and Mr. Jackson were engaged in a sexual relationship. Construing all facts in the light most favorable to plaintiff, and for purposes of the present motion only, the particulars of that relationship are as follows. In October 2001, approximately one month after plaintiff was placed in the Jackson/Hammonds foster home, Montaque Jackson, the adult son of plaintiff's foster parents, asked plaintiff to have sex with him. (RJSMF at ¶ 22.) Plaintiff began having "consensual"[3] sex with Montaque Jackson [hereinafter Montaque"] in the basement of the Jackson/ Hammonds foster home two to three times a week. (*Id.* at ¶ 23.) Though the first sexual encounter between plaintiff and Montaque occurred during the daytime, as a standard practice, plaintiff and Montaque would engage in sexual intercourse around 2:00 or 3:00 a.m. when everyone else in the house was asleep. (RJSMF at ¶ 24; Tiffany Dep. at 49) According to plaintiff, as she was getting ready for bed, he would ask her to

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3. The Court is reluctant to construe any sexual relationship between a thirteen year old and a thirty-two year old as "consensual" or "voluntary." Because plaintiff testified in her deposition that he physically and verbally agreed to all but one of the numerous sexual encounters between herself and Mr. Jackson, however, the Court will refer to all encounters, except the alleged "rape," as "consensual."

come to his room and she would go knowing that they would most likely have intercourse, (Tiffany Dep. at 47-48.) Indeed, plaintiff's testimony does not indicate that there ever was a time when she went to Montaque's room in the middle of the night that the two did not have intercourse. The logistics of all this were made much easier by the fact that both plaintiff and Montaque's bedrooms were located in the basement of the Jackson/Hammonds foster home. (RJSMF at ¶ 25; Tiffany Dep. at 27, 29.)

At least once during the course of their sexual relationship, Montaque asked plaintiff to have sex with him and plaintiff refused. (Tiffany Dep. at 39.) As plaintiff describes the incident, the two were sitting on Montague's bed, he asked plaintiff to have sex, plaintiff refused, and then the two had sex anyway. (*Id.* at 39-41.) After this episode, plaintiff told no one about what had happened, and plaintiff and Montaque resumed having "consensual" sex. (*Id.* at 48.)

Plaintiff's silence with regard to this episode is consistent with plaintiff and Montaque's efforts to keep their relationship concealed. In fact, prior to learning she was pregnant, plaintiff had not told her case manager, her foster mother or father, Ms. Jackson and Mr. Hammonds, her mother, or anyone else that she and Montaque were engaging in sexual intercourse. (RJSMF at ¶ 35.) Indeed, even after being told by the doctor that she was pregnant, plaintiff initially told her mother, to whose physical custody plaintiff was temporarily returned in May 2001, that the father of her baby was "Shawn" Morris Wilson, the teenage grandson of Ms. Jackson and Mr. Hammonds.[4] (*Id.* at ¶ 30.)

4. At some point during plaintiff's stay in the Jackson/Hammonds foster home, DFCS had received a referral alleging that (Cont'd)

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Only after plaintiff's mother called the Jackson/Hammonds foster home and spoke with Ms. Jackson's daughter, did plaintiff tell her mother the truth: that she had been impregnated by Montaque Jackson. (Priscilla Dep. at 115-19.)

On August 30, 2001, shortly after taking plaintiff to the doctor and learning that she was pregnant, and having just spoken with Ms. Jackson's daughter, Ms. Williams telephoned plaintiff's case manager. (RJSMF at ¶ 32.) At that time,[5] plaintiff's case manager was defendant Stacy Reed. As plaintiff's case manager, Ms. Reed was supposed to supervise plaintiff, as well as her foster care home assignment (*Id.* at ¶ 11.) Though Reed was not involved in the decision to place plaintiff in the Jackson/Hammonds foster home, Reed did visit plaintiff in the home. (*Id.* at 18.) According to plaintiff, Reed only came to see her when it was time for plaintiff to go to court or when plaintiff skipped school. (Tiffany Dep. at 222-23.) Plaintiff says these visits did not occur "often enough." (*Id.* at 223.) According to Ms. Reed, pursuant to DFCS policy, she visited every child she was responsible for who was placed in a typical foster care environment, like the Jackson/Hammonds foster home, at least one time per month. (Dep. of Stacy Reed, December 6, 2004 ("Reed Dep.") [85] at 48.) Regardless of when and how often

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(Cont'd)
foster children in this home were engaging in sexual activity with Ms. Jackson and Mr. Harmmonds' grandson, "Shawn" Morris Wilson. Shawn Wilson did not reside in the Jackson/Hammonds home and the investigation concluded that the allegations were unsubstantiated. (RJSMF at ¶ 39.)

5. Ms. Reed's employment with DFCS ended on April 30, 2004. (RJSMF at ¶ 1.)

these visits occurred, both plaintiff and Ms. Reed agree that, during these visits, Reed asked plaintiff how everything was in her home assignment and whether everything was okay. (*Id.* at 143.) In response to these inquiries, plaintiff never told Reed that she was having sex with Montaque Jackson, or even that Montaque was living in the house. (Tiffany Dep. at 224-26.) Instead, plaintiff told Ms. Reed that things were "going all right." (*Id.* at 252.)

Indeed, Montaque Jackson, who had previously been convicted for robbery with use of a firearm and forcible contact sexual abuse, had not been approved by DFCS to live in the Jackson/Hammonds foster home. Ms. Reed testified that, if she ever saw people inside a foster home other than the foster parents and foster children, it was her general practice to ask whether they lived in the house. (Reed Dep. at 67-68, Pl.'s Ex. 1.) There appears to be no evidence, however, that she made any such inquiries about Montaque Jackson. Likewise, there is no evidence that she was ever actually aware that Montaque lived in the home; in fact, Reed has testified that she was not aware of that fact.[6] (*Id.* at 84-86.) (Reed understood and believed that the only people living in the Jackson/Hammonds foster home were Ms. Jackson, Mr. Hammonds, and the foster children placed there by DFCS; *see also id* at 117.)

A persistent focus by both parties in this litigation has concerned whether there were sufficient facts to put defendant Reed on notice that Montaque actually lived in the foster home.

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6. Notably, the foster mother, Ms. Jackson, continues to deny that her son actually lived in her home. Instead, the gist of her testimony is that he came and went as he saw fit, but never kept any clothes or belongings in the home. (Dep. of Marion Jackson, December 16, 2004 ("Marion Dep.") [85] at 36, 38-39.)

Reed testified in her deposition that, although she visited the home once a month, she did not see Jackson there during every visit. (*Id.* at 81.) To the contrary, she saw him there "not too often." She could not remember exactly how many times she saw Montaque Jackson at the house, but she thought that she might have seen him there on two visits. (*Id.* at 82.) The foster mother, Marion Jackson, testified that she thought that Reed had seen Montague more than once at the house. (Marion Dep. at 95).

Thus, the undisputed evidence is that Reed had seen Montaque Jackson at the home on more than one occasion and her recollection is that it was on two occasions. As to plaintiff, she never mentioned to Ms. Reed or Ms Reed's social services supervisor from August 2000-October 2000, defendant Mary Jenkins, that Montaque visited, stayed overnight, or lived in the Jackson/Hammonds foster home. (RJSMF at ¶¶ 2, 20.) Nor does there appear any evidence that plaintiff was ever asked about Montaque Jackson.

Having received the call from Ms. Williams informing her that plaintiff was pregnant by Montaque,[7] Ms. Reed immediately contacted her supervisor at the time, Patricia Nealy, to inform her of the allegations and to discuss how to

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7. At this time, plaintiff was in the physical custody of her biological mother, Ms. Williams. However, DFCS continued to retain legal custody of plaintiff. Ms. Williams' parental rights have since been terminated because of Ms. William's continued involvement with drugs. (RJSMF at ¶ 42.) Plaintiff and Tianna Williams are now in foster care at the home of Mariam Williams, an unrelated approved foster parent, under the custody and supervision of DFCS. (*Id.* at ¶ 41.)

proceed. (Reed Dep. at 153.) Ms. Reed's supervisor told her to go to plaintiff's school to pick up plaintiff and discuss the matter, and then to make a referral to the Child Protective Services Unit ("CPS").[8] Ms. Reed did both. (*Id.*) The ensuing conversation between plaintiff and Reed was the first time that plaintiff informed Reed that she had been having sex with Montaque Jackson. (RJSMF at ¶ 32; Reed Dep. at 156.) After speaking with a CPS investigator, plaintiff was returned to the physical custody of her mother. (Reed Dep. at 157.)

Plaintiff remained in her mother's home during her pregnancy and up until Tianna was approximately three months old. Plaintiff was ultimately removed from her mother's home after DFCS received a report that Ms. Williams and her then boyfriend were using crack cocaine in the presence of plaintiff and her infant daughter. (Priscilla Williams Dep. at 128.) As a final epilogue to this thoroughly sorry tale, Montague Jackson, the father of plaintiff's child, is currently serving a life sentence for an unrelated murder, as well as ten years for the statutory rape of plaintiff. (Reed Dep. at Pl.'s Ex. 2.)

II. Procedural History

Acting through her biological mother and next friend, Priscilla Williams, plaintiff filed this civil action on March 25, 2004. (Compl. for Damages [1] at 1.) In her initial complaint,

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8. The Child Protective Services Unit of DFCS is charged with investigating any allegations of abuse or neglect of foster children. Foster care case managers do not investigate allegations of abuse or neglect. If such allegations are made known to a foster care manager, he or she must forward these allegations to CPS. (RJSMF at ¶¶ 10, 12.)

plaintiff named as defendants her foster mother, Mary Ann Jackson; her foster father, James Jackson; her case manager, Stacy Reed; Ms. Reed's social services supervisor from August 2000-October 2000, Mary Jenkins; an investigator in the CPS division of DFCS, Awaldi Elliot; and Montaque Jackson. (*Id.*) On November 22, 2004, plaintiff filed her First Amended Complaint for Damages to correctly identify her foster mother as Marion Jackson and her foster father as John Hammonds, and to drop her claim for cruel and unusual punishment under the Eighth Amendment. (First. Am. Compl. for Damages [47] at 2-3.)

By this Order, the Court today **GRANTS** the Consent Motion to Drop Defendant Awaldi Elliot [71] and Plaintiff's Motion to Drop Defendant Mary Jenkins [110]. Further, as plaintiff has taken no action since filing this Complaint in March, 2004 to prosecute this action against defendant Montague Jackson, the Court deems her to have abandoned her claims against him. Thus, pursuant to L.R. 41.3A,[9] the Court **DISMISSES** defendant Montague Jackson from the action.[10]

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9. L.R. 41.3A(3), NDGa provides, "The court may, with or without notice to the parties, dismiss a civil case for want of prosecution if . . . [a] case has been pending in this court for more than six (6) months without any substantial proceedings of record, as shown by the record docket or other manner, having been taken in the case."

10. At any rate, Montague Jackson would likely be able to muster the same successful defenses to a federal § 1983 action as his parents have raised; he is clearly not a State actor. See discussion *infra* at 16. Moreover, now serving a life sentence in prison, Montaque likely has no assets to satisfy a judgment.

This leaves as the defendants in this case: the foster parents, Marion Jackson and John Hammonds, and Stacy Reed, the DFCS caseworker. Plaintiff seeks to recover money damages against these defendants for deprivation of her Fourteenth Amendment rights, pursuant to 42 U.S.C. §§ 1983 and 1988.[11] (Marion Jackson and John Hammonds' Statement of Material Facts to Which There is No Genuine Issue to Be Tried ("JHSMF") [59] at ¶ 2.) Ms. Jackson and Mr. Hammonds have, together, moved for summary judgment on all claims against them. (J&H Mot. for Simm. J. at 1.) Ms. Reed has also moved for summary judgment on all claims against her. (Defs. Reed and Jenkins' Mot. for Simm J (R&J Mot. for Simm J.) [80] at 1.)

DISCUSSION

I. Summary Judgment Standard

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)).

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11. In *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (*en banc*) this circuit held that, "a child involuntarily placed in a foster home is in a situation so analogous to a prisoner in a penal institution and a child confined in a mental health facility that the foster child may bring a section 1983 action for violation of fourteenth amendment rights."

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Summary judgment is not properly viewed as a device that the trial court may, in its discretion, implement in lieu of a trial on the merits. Instead, Rule 56 of the Federal Rules of Civil Procedure *mandates* the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of *every* element essential to that party's case on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In such a situation, there can be no genuine issue as to any material fact, as a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Id.* at 322-23.

The movant bears the initial responsibility of asserting the basis for his motion. *Id.* at 323; *Apcoa, Inc. v. Fidelity Nat'l Bank*, 906 F.2d 610 611 (11th Cir. 1990) The movant is not required to negate his opponent's claim, however. The movant may discharge his burden by merely "'showing'--that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. After the movant has carried his burden, the nonmoving party is then required to "go beyond the pleadings" and present competent evidence[12] designating "'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). While the court is to view all evidence and factual inferences in a light most favorable to the nonmoving party, *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1236 (11th Cir. 2003), "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise

12. The nonmovinig party may meet its burden through affidavit and deposition testimony, answers to interrogatories, and the like. *Celotex*, 477 U.S. at 324.

properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

A fact is material when it is identified as such by the controlling substantive law. *Id.* at 248. An issue is genuine when the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Id.* at 249-50. The nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 75 U.S. 574, 586-87 (1986) (citations omitted). An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or is "not significantly probative." *Anderson*, 477 U.S. at 249-50. Thus, to survive a motion for summary judgment, the nonmoving party must come forward with specific evidence of *every* element material to that party's case so as to create a genuine issue for trial.

II. Marion Jackson and John Hammonds' Motion for Summary Judgment

Defendants Marion Jackson and John Hammonds, the foster parents, ask this Court to grant their motion for summary judgment on the grounds that they cannot be held liable for any of the constitutional violations asserted by plaintiff because they are not State actors under 42 U.S.C. § 1983. (J&H Mot. for Simm. J. at 1.) In addition, to the extent that plaintiff's amended complaint asserts any state law claims, Ms. Jackson and Mr. Hammonds seek summary

judgment on the grounds that the Georgia Tort Claims Act bars such claims against them. (*Id.* at 12.) In her brief opposing Jackson and Hammonds' motion for summary judgment, plaintiff clarifies that she is not asserting any state law claims against either Ms. Jackson or Mr. Hammonds in the present case. (Br. in Opp'n to Defs. Marion Jackson and John Hammonds' Mot. for Simm. J. ("Opp'n to J&H") [77] at 6.) Consequently, the Court considers only whether Jackson and Hammonds are entitled to summary judgment for the claims made by plaintiff under 42 U.S.C. § 1983.[13]

In order to successfully state a claim for relief under 42 U.S.C. § 1983, plaintiff must show that she was deprived of a right, privilege, or immunity secured by the Constitution or laws of the United States by a person acting under color of state law. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999); *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992). In this case, Jackson and Hammonds do not seriously attempt to argue that plaintiff's constitutional rights were not violated. Instead, they argue that, at least as to them, plaintiff's rights were not violated by a person acting under color of state law. Thus, the critical question before this Court is whether Jackson and Hammonds, as the foster parents overseeing the Jackson/Hammonds foster home at the time Montaque Jackson lived in the home and sexually assaulted plaintiff, are properly

13. 42 U.S.C. § 1983 provides, in relevant part, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ."

considered State actors who acted under color of state law. The Court engages in this inquiry aware that, "[o]nly in rare circumstances can a private party be viewed as a 'State actor' for section 1983 purposes." *Id.*

In support of their argument that they are not State actors subject to section 1983 liability, defendants Jackson and Hammonds cite *Rayburn v. Hogue*, 241 F.3d 1341 (11th Cir. 2001) In Rayburn, on facts similar to those presented here, the Eleventh Circuit considered an interlocutory appeal of a district court order denying summary judgment to the foster parents of two children who had been, in the case of the first child, sexually molested, and, in the case of the second child, abused by a third foster child living in the foster home. *Id.* at 1342-43. Unlike in the current case, where the sexual assault of plaintiff by Montaque Jackson was unknown to either her foster parents or DFACS authorities during the time plaintiff resided in the foster home, in *Rayburn* the natural mother of the victimized children repeatedly notified the Carroll County, Georgia Department of Family and Children's Services ("Carroll DFACS") that she suspected her children were being seriously abused in their foster care home. *Id.* at 1343-45. Though Carroll DFACS' initial investigation concluded with a finding that the natural mother's allegations were without merit, Carroll DFACS initiated a second investigation after the children were returned to the physical custody of their natural mother. This second investigation concluded, consistent with the children's accounts and their natural mother's previous allegations, that one of the children had been sexually molested, most likely during the time that the children were living in the foster care home. *Id.* at 1346. The natural mother brought suit on behalf of her two children under 42 U.S.C. § 1983 for violations of the children's

substantive and procedural due process rights under the Fifth and Fourteenth Amendments of the United States Constitution. *Id.*

Addressing the merits of plaintiffs' claims, the *Rayburn* court indicated, as the district court below it had done, that the Eleventh Circuit employs three distinct tests to determine whether the actions of a private entity are properly attributed to the state. *Id.* at 1347; *see also Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1277 (11th Cir. 2003).

> [T]o hold that private parties . . . are State actors, this court must conclude that one of the following three conditions is met: (1) the State has coerced or at least . significantly encouraged the action alleged to violate the Constitution ("State compulsion test"); (2) the private parties performed a public function that was traditionally the exclusive prerogative of the State ("public function test"); or (3) the State had so far insinuated itself into a position of interdependence with the private parties that it was a joint participant in the enterprise ("nexus/joint action test")

Rayburn, 241 F.3d at 1347 (internal quotations and citations omitted).

The Eleventh Circuit panel in *Rayburn* agreed with the district court's conclusion that the State had in no way coerced or encouraged the conduct of the foster parents as it related to the sexual assault and abuse of the two children, thereby rejecting a notion of state action under a "State compulsion test." The panel also agreed with the district court that foster care is not

traditionally the exclusive prerogative of the state, thereby negating state action under the "public function test." The Eleventh Circuit, however, disagreed with the district court's conclusion that the foster parents became State actors under a "nexus/joint action test."

With regard to the "nexus/joint action test," the district court had reasoned that, because the Georgia Tort Claims Act defines foster parents as State employees and provides total immunity to foster parents for torts committed during their employment as foster parents,[14] the State of Georgia had created a "nexus between the State and the regulated activity of foster parents that is sufficient to make the [foster parents] State actors for purposes of the fourteenth amendment." *Id.* (citing *Rayburn v. Farnesi*, 70 F. Supp. 2d 1334, 1344 (N.D. Ga. 1999) (Camp, J.))

Disagreeing with the district court's reasoning, the Eleventh Circuit emphasized that, to satisfy the "nexus/joint action test," the governmental body and the defendant private parties must be intertwined in a symbiotic relationship that must involve the specific conduct of which plaintiff complains. *Id.* at 1348. "[T]he mere fact that a State regulates a private party is not sufficient to make that party a State actor." *Id.* (citing *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). Finding that the State of Georgia's symbiotic relationship with foster parties does not

14. O.C.G.A. § 50-21-22(7) provides, "'[s]tate officer or employee' means an officer or employee of the state, elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of the state in any official capacity, whether with or without compensation . . . An employee shall also include foster parents and foster children."

encourage or sanction child abuse in any way, the *Rayburn* court concluded that the Georgia Tort Claims Act's extension of governmental tort liability and immunity rules to foster parents does not transform foster parents into State actors. *Id.* In other words, the "nexus/joint action test" had not been met. In doing so, the Eleventh Circuit recognized the refusal of the Fourth, Sixth, and Seventh Circuits to attribute the actions of foster parents to the State. *Id.* at n. 10.

Faced with binding precedent that appears directly on-point, plaintiff argues that *Rayburn's* holding that foster parents are not State actors for purposes of section 1983 liability does not control this dispute because "the *Rayburn* court did not address the issue of whether 'foster parents' should be considered 'State actors' if they are state employees who have abused their power," and, instead, "limited its analysis to a review of the district court's holding, which assumes that foster parents are 'private parties.'" (Opp'n to J&H at 2.) Like the plaintiff in *Rayburn*, plaintiff in this case focuses on the fact that O.C.G.A. § 50-21-22(7) defines foster parents as "state employees," and then goes on to argue that Ms. Jackson and Mr. Hammonds are State actors because they acted with authority possessed by virtue of their employment with the State. (*Id.* at 9 (citing *Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1303 (11th Cir. 2001)) ("A person acts under color of state law when he acts with authority possessed by virtue of his employment with the state. . . It is firmly established that a defendant in a § 1983 suit acts under color of law when he abuses the position given to him by the state.") (internal citations omitted).) Alternatively, plaintiff argues that defendants are State actors under what plaintiff deems the "entwinement test" set forth by the United States Supreme Court in the post-*Rayburn* decision *Brentwood Acad. v. Tenn. Secondary School Athletic Ass'n*, 531 U.S. 288 (2001). (Opp'n to J&H at 2.)

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In arguing that the Georgia Tort Claims Act somehow transforms foster parents from private parties into State actors, plaintiff is effectively recycling the same argument that was rejected in *Rayburn*. While O.C.G.A. § 50-21-22(7) says that "'State officer or employee' . . . shall also include foster parents and foster children," the Eleventh Circuit made it clear that this definition does nothing more than extend governmental tort liability and immunity rules to foster parents. Nothing in the language of O.C.G.A. § 50-21-22(7) transforms Ms. Jackson or Mr. Hammonds into State actors for purposes of § 1983. *Rayburn*, 241 F.3d at 1348 ("Likewise, the act of extending governmental tort liability and immunity rules to foster parents does not transform the [foster parents] into State actors."). Otherwise, as the Eleventh Circuit pointed out in Rayburn, foster children themselves would also be State actors because the Georgia Tort Claims act includes foster children in the definition of State employees. *See id.*

Finally, plaintiff correctly notes that, at both the district and circuit court levels, the *Rayburn* courts assumed that foster parents are private parties. This is because they are. Plaintiff has not cited any case law to justify disturbing this assumption. While foster parents receive some state funds each month, approximately $350 per child,[15] these funds are intended to offset the cost of clothing, feeding, sheltering, and transporting the children placed under the foster parents' care. These funds are not intended to, nor does the limited sum of $350 suggest that they do, compensate the foster parent or parents for the time

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15. In her deposition, Ms. Jackson testifies that she received something less than $400 and something more than $300 per child, or approximately $350 per child per month. (Marion Dep. at 81-82.)

expended in caring for and raising their foster children. In the end, as this circuit previously held in *Rayburn*, foster parents' status as "State employees" under O.C.G.A. § 50-21-22(7) does not transform Georgia foster parents into State actors. Plaintiff's first argument having failed, the Court now addresses plaintiff's assertion that defendants are State actors under the "entwinement test" of *Brentwood*.

In *Brentwood Acad. v. Tenn. Secondary School Athletic Ass'n*, 531 U.S. 288 (2001), a private high school sued a State interscholastic athletic association under section 1983 in an effort to prevent that athletic association from sanctioning the school. The issue before the Court was "whether a statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools may be regarded as engaging in state action when it enforces a rule against a member school." *Id.* at 290. The Court ruled that, by virtue of its regulatory enforcement action, the interscholastic association was a State actor for purposes of the Fourteenth Amendment. *Id.* at 305. In arguing that *Brentwood* announces a new, additional test for finding private parties to be State actors, plaintiff seizes on language from the dissent stating, "[w]e have never found state action based upon mere 'entwinement' Until today, we have found a private organization's acts to constitute state action only when the organization performed a public function; was created, coerced, or encouraged by the government; or acted in a symbiotic relationship with the government." *Id.* at 305 (Thomas, J., dissenting).

Notwithstanding the above language in the dissent, the notion that Brentwood creates a new "entwinement" test, distinct from previous tests, is far from universally accepted.

Indeed, the majority, recognizing that "[e]ntwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards," appeared instead to be applying the oft mentioned "nexus/joint action test." *See id.* at 295, 302 ("Thus, we say that state action may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.") (internal citations and quotations omitted); *see also Doe v. Harrison*, 254 F. Supp. 2d 338, 343 (S.D.N.Y. 2003) ("Doe contends that the Supreme Court's decision in *Brentwood* casts this analysis into doubt . . . the decision is simply a straightforward application of the close nexus test.")

Importantly, in *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1277 (11th Cir. 2003), citing *Brentwood*, this circuit, once again, stated unequivocally, "[w]e have employed three distinct tests in determining whether the actions of a private entity are properly attributed to the state." No mention was made of any "entwinement" test as a fourth possible basis for finding a private entity to be a State actor. The Eleventh Circuit having declined to expand its three test system to include a fourth, this Court does the same.

Therefore, *Rayburn*, which holds that foster parents are not State actors for purposes of liability under 42 U.S.C. § 1983, is controlling authority. Clearly, this sordid tale of a thirty-two year old male sexually exploiting a thirteen year old foster child in his home is one that should inspire anger and sadness in any decent person. Yet, Section 1983, under which plaintiff sues, reaches only State actors. Because

binding law holds that the foster parents are not State actors, plaintiff's federal claim against them for their responsibility in ignoring the risk that their felon son posed to the girls in their home must fail. For this reason, the Court **GRANTS** Marion Jackson and John Hammonds' Motion for Summary Judgment [59].

III. Stacy Reed's Motion for Summary Judgment

A. *Plaintiff's Contentions*

Plaintiff claims that defendant Stacy Reed, plaintiff's case manager during the relevant time period, deprived plaintiff of her substantive due process rights under the Fourteenth Amendment by failing to properly monitor plaintiff while she was in the foster home, thereby subjecting plaintiff to sexual harm at the hands of Montaque Jackson (R&J Mot. for Simm. J. at 3.) Defendant Reed contends that she is entitled to summary judgment on this claim (1) because plaintiff cannot show that Reed was "deliberately indifferent" to a risk posed to plaintiff and (2) because Reed did not "proximately cause" plaintiff's injuries. Alternatively, defendant Reed argues that plaintiff's claim against her is barred by the doctrine of qualified immunity.

In response, plaintiff contends that Reed had actual knowledge that Montaque Jackson was residing in the Jackson/Hammonds foster home because Reed knew that he was the foster parents' son and had seen him there on more than one occasion. According to plaintiff, once armed with "actual knowledge" that Jackson lived in the foster home, defendant Reed failed to "act accordingly"; that is, presumably to take steps to trigger a background investigation of Jackson. (Pl.'s

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Br. in Opp'n to D. Stacy Reed's Mot. for Simm. J. ("Opp'n to Reed") [104] at 15-16.)

Second, plaintiff argues that even if defendant Reed did not actually know that Montaque Jackson was living in the foster home, she should have made an inquiry of the foster parents or foster children about his residency. Plaintiff assumes that this inquiry would have alerted Reed to the fact that Montaque lived in the home, after which she would have been expected to cause a background check to be done, which check would likely have revealed Montaque's criminal record and then might have prompted DFCS to take steps either to remove him from the home or to remove the children from the home. (*Id.*) Defendant Reed's failure to make this inquiry--and then to perform the other described acts that would have followed--constituted "deliberate indifference," according to plaintiff.

As to proximate cause, plaintiff contends that defendant Reed's failure to make an inquiry as to whether Montaque lived in the home proximately caused her sexual relationship with Montaque to continue undiscovered. (*Id.* at 18.) Finally, plaintiff insists that Ms. Reed is not entitled to qualified immunity because plaintiff's right to be free from sexual abuse while in foster care was clearly established at the time plaintiff was living in the Jackson/Hammonds foster home. (*Id.* at 20.)

In short, plaintiff does not claim that defendant Reed actually knew that she was having a sexual relationship with Montaque Jackson. Instead, she is claiming that defendant Reed failed to make inquiries, the response to which might have alerted Reed to the fact that Montaque was living in the home, which knowledge might have prompted Reed to then request a

criminal background check on Montaque. Had Reed done such a check and then learned that Montaque had a prior conviction for sexual contact with a minor, she would have then been on notice of the risk that he might repeat this behavior with the plaintiff. According to plaintiff, defendant's failure to make these inquiries constituted her deliberate indifference to a risk to plaintiff's safety. *See Ray v. Foltz*, 370 F.3d 1079, 1081. (11th Cir. 2004)

B. *Application of Controlling Legal Principles to the Facts*

"It is clearly established in this circuit that foster children have a constitutional right to be free from unnecessary pain and a fundamental right to physical safety." *Ray*, 370 F.3d at 1082 (internal citation omitted). In *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc), the Eleventh Circuit held, for the first time, that a child involuntarily placed in a foster home may bring an action under 42 U.S.C. § 1983 against the state officials involved in the foster care placement for violations of that child's Fourteenth Amendment rights sustained in the foster home. *Id.* at 792, 797. In doing so, the *Taylor* court recognized, "[c]hildren in foster homes, unlike children in public schools, are isolated; no persons outside the home setting are present to witness and report mistreatment. The children are helpless. Without the investigation, supervision, and constant contact required by statute, a child placed in a foster home is at the mercy of the foster parents." *Id.* at 797. However, while analogizing a foster child involuntarily placed in a foster home to a prisoner involuntarily placed in an institution, the *Taylor* court cautioned that, "[t]he lack of proximity in the

foster home situation simply suggests that deliberate indifference is not as easily inferred or shown from a failure to act." *Id.* at 796. Thus, in order to successfully recover from state officials in a section 1983 action, a child abused in foster care is faced with the "difficult problem" of showing "actual knowledge of abuse or that agency personnel deliberately failed to learn what was occurring in the foster home . . . only where it is alleged and the proof shows that the state officials were *deliberately indifferent* to the welfare of the child will liability imposed" *Id.* at 796-97 (emphasis added).

In *Farmer v. Brennan*, 511 U.S. 825, 835 (1994), resolving a split among the United States Courts of Appeals, the United States Supreme Court clarified that "deliberate indifference" is a subjective, rather than objective, standard describing "a state of mind more blameworthy than negligence" where the state official "knows of and disregards an excessive risk" to the victim's health or safety. *Id.* at 837. The Court cautioned, "the official must be both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* Mindful of "society's outrage at the exposure of defenseless children to gross mistreatment and abuse" the Court applies the principles of law stated above to the facts of this case. *See Taylor*, 818 F.2d at 797.

As both parties concede, it has always been the stated policy of DFACS, Ms. Reed's employer during the relevant time period, that the safety of foster children is of paramount importance. (RJSMF at ¶ 14.) Further, DFACS employees are expected to be continually alert to risks to the safety of

children and to take prompt action when risks are discerned. (*Id.*) While the specific facts of *Taylor* established that foster children have a liberty interest to be free from beatings that leave them in a coma, the liberty interest announced in *Taylor* was much broader. Indeed, since *Taylor*, the law in this circuit has clearly been that foster children have the right to be free from the infliction of unnecessary pain and the right to physical safety. *Id.* at 794 ("The liberty interests in this case are the right to be free from the infliction of unnecessary pain, as that interest is protected by the fifth and fourteenth amendments, and the fundamental right to physical safety as protected by the fourteenth amendment."). Thus, this Court concludes that plaintiff's right to be reasonably safe in her foster home was violated by an ongoing sexual relationship with a thirty-two year old man living in the home, even if plaintiff consented to that sexual relationship. This conclusion, however, is just one part of the Court's analysis. In order for defendant Reed to be liable for the sexual abuse sustained by plaintiff, the law also requires plaintiff to prove that defendant Reed was deliberately indifferent to this violation of her rights. *See Ray*, 370 F.3d at 1083 (citing *Taylor*, 818 F.2d at 797). This plaintiff has not done.

As noted, there is no evidence that defendant Reed was aware that plaintiff was having a sexual relationship with Montague Jackson or anyone else, for that matter. Indeed, plaintiff concedes that she, along with Montaque, attempted to keep the relationship a secret. Likewise, there is no evidence that the foster parents knew that plaintiff and Montague were having sexual relations. Again, plaintiff noted that their sexual encounters usually occurred in the early morning hours when the household was asleep. Accordingly,

plaintiff has failed to prove any actual knowledge by defendant Reed that this sexual relationship was ongoing.

Therefore, to succeed on her claim against Reed, plaintiff must show that Reed was deliberately indifferent to facts that would have suggested that plaintiff was having a sexual relationship with Montaque. In applying this standard to the present case, a review of the *Ray* decision is helpful. In *Ray*, a ten-month old foster child had been murdered by her foster mother a few months after being placed in the foster home; the foster parents thereafter sued various DFCS employees under § 1983, alleging that the latter had failed to adequately monitor the foster home.

Although acknowledging the obvious fact that being murdered violated one's right to be safe, the panel noted that to receive money damages from a particular DFCS employee for this constitutional violation, the plaintiff had to prove more than mere negligence or carelessness by the employee. *Ray*, 370 F.3d at 1083. Instead, the plaintiff had to prove that the particular employee was deliberately indifferent, which means that the employee had "disregard[]ed a risk of harm of which he [was] *actually aware*." *Id.* In other words, the plaintiff had to prove that the particular employee both knew of and disregarded an excessive risk of harm to the child. *Id.*

In the *Ray* case, the plaintiff had contended that the defendants had failed to gather information that might have alerted them as to the unfitness of the foster parents to serve in that capacity. The panel, however, concluded that, at most, the plaintiff was accusing the defendants of mere negligence, which conduct does not rise to the required level of deliberate indifference. *Id.* at 1084.

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Applying *Ray* to this case, the plaintiff must show that defendant Reed was aware of facts that would have put her on notice of the risk that the plaintiff was having a sexual relationship and that Reed deliberately ignored those facts and chose not to investigate. As noted, defendant Reed testified that it was her belief and understanding that the only people living in the home were the foster parents and the children. (Reed Dep. at 84-86). Further, the evidence indicates that Reed saw Montaque Jackson in the foster home on a couple of occasions during her visits. From that observation, plaintiff argues that Reed should have then inquired of the foster parents or the plaintiff whether Montaque lived in the home. Had Reed inquired of the foster mother, however, it is unlikely that Ms. Jackson would have admitted that Montaque lived with her. The Court draws this conclusion because it was Ms. Jackson's rather strained position during the deposition, at a time when all facts suggested the contrary, that Montaque had *not* lived with her.

Perhaps, had she been asked, plaintiff would have acknowledged that Montague spent nights there. Yet, plaintiff has acknowledged that she had tried to keep the relationship a secret and that she had even initially lied when her pregnancy was discovered, by naming someone other than Montaque as the father of her baby. Nevertheless, whatever plaintiff might have said, the pertinent inquiry, according to *Ray*, is not whether the defendant failed to ask a question that one wishes she had asked. Rather, plaintiff must show that Reed's observation of Montaque in the home on a couple of occasions was sufficient to have caused her to infer that he might live there and then to infer that, if Montaque did indeed reside in the home, he posed a danger of sexually

assaulting the plaintiff. The Court concludes that awareness that a male adult is in a home on a couple of occasions does not necessarily indicate that the male lives in the home or that, if he does so reside, that he would likely pose a risk of sexual molestation to a child in that home.[16] In short, the Court concludes that, by not inquiring about Montague's presence in the home, defendant Reed was not as thorough as she should have been and therefore was arguably negligent. Yet, as *Ray* has made clear, a showing of negligence does not meet a plaintiff's duty to show deliberate indifference.

Plaintiff cites *Miracle v. Spooner*, 978 F. Supp. 1161 (N.D. Ga. 1997) (Thrash, J.), a case in which the district court denied the summary judgment motion of a defendant foster care case manager who failed to conduct all but one visit to the foster home and did not return calls from the foster parents reporting that they were incapable of handling the foster children placed in their care. Defendant Reed's conduct, however, can be distinguished from the caseworker in *Miracle*, as Reed appears to have been an adequately

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16. That the Court has concluded that the defendant's conduct does not meet the rigorous standards imposed by the deliberate ignorance test should not suggest that this Court endorses anything less than a thorough monitoring by DFCS employees of a foster home in which vulnerable children are placed. The Court wishes that defendant had inquired about Montaque's status and, whatever the answer, had requested that DFCS officials make further formal inquiry and do a criminal background check of him. Yet, as noted at length *supra*, that defendant Reed may have been negligent is an inadequate showing for purposes of plaintiff proving her to be guilty of a constitutional violation and thereby requiring her to pay damages to plaintiff.

responsive foster care case manager. Defendant Reed testified that, as she did for all children in her caseload who were assigned to private foster care homes, she visited plaintiff at least one time per month. (Reed Dep. at 48.) Plaintiff does not directly counter this assertion, except to say that Ms. Reed did not visit "often enough" or "like she's supposed to." (Tiffany Dep. at 223.) Still, plaintiff admits that Reed came to see her when it was time for plaintiff to appear in court and when she skipped school. (*Id.* at 222-23.) Taking plaintiff's somewhat vague testimony in the best possible light, it is undisputed that Reed made multiple visits to the foster home. Moreover, plaintiff responded to Ms. Reed's inquiries about how things were going in the home by telling Ms. Reed that, "it's going all right." (*Id.* at 252.) Plaintiff admits that she never told Ms. Reed that something was bothering her. (*Id.*) Thus, there was nothing in her interaction with plaintiff that would have suggested to Reed that anything was amiss in the home. To the contrary, the record indicates that Reed made ongoing inquiries as to how plaintiff was doing.

Once defendant Reed was informed by plaintiff's biological mother that plaintiff was pregnant by Ms. Jackson's grown son, Ms. Reed contacted her supervisor, picked up plaintiff at her school to discuss the matter with plaintiff, and referred plaintiff's case to CPS for investigation. (Reed Dep. at 153.) In other words, the first time that Ms. Reed learned that plaintiff may have been the victim of abuse, Ms. Reed acted quickly to investigate the matter.

In short, without evidence that the defendant knew

of the sexual abuse or deliberately failed to learn of this abuse when aware of facts that should have alerted her to its existence, the Court cannot conclude that defendant was deliberately indifferent to a risk to plaintiff's safety. *Ray*, 370 F.3d at 1084. Without deliberate indifference, Ms. Reed cannot be found liable. The Court therefore **GRANTS** Defendant Reed's Motion for Summary Judgment [80].[17]

17. As the Court has concluded that no evidence exists to support an inference of deliberate indifference, it does not have to reach the question of proximate cause. Likewise, there is no need to discuss defendant's alternative defense of qualified immunity. The Court concludes that the law was clearly enough established to put a case worker on notice of her duty to report a foster child's sexual relationship with an adult male living in the child's foster home. Yet, that conclusion begs the pertinent question here, and discussed *supra*, which is whether defendant Reed knew or was deliberately indifferent to the fact that plaintiff was having such a relationship.

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CONCLUSION

Plaintiff Tiffany Williams has been ill treated by the most important adults in her life. Her biological mother, an apparent drug addict, rendered such inadequate care that Tiffany was removed to DFCS custody and a foster home. Her biological father was a drug dealer. Tiffany's foster mother, Marion Jackson, appears to have done an adequate job as a foster mother, having brought some order into Tiffany's chaotic life, except for one dereliction of duty. That one dereliction, however, was enormous, as Ms. Jackson allowed her adult son to reside in her home, in a bedroom next to the plaintiff's bedroom, even though one could reasonably assume that Ms. Jackson knew that this son had been convicted of sexual contact with a minor. This son, Montaque, then initiated a sexual relationship with Tiffany that robbed her of any remaining innocence that she might have had and that resulted in her pregnancy at the age of fourteen.

Tiffany's disappointing encounters with adults were not over, however, as after she had been returned to her biological mother's custody, her mother's parental rights were permanently terminated when it was learned that the mother and her current boyfriend had smoked crack in front of Tiffany and Tiffany's infant daughter. As a result of her mother's conduct, Tiffany was again removed to another foster home, joined by her infant daughter, Tiana. And so the bleak cycle continues.

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One would hope that in an orderly and just world, there would be consequences for such treatment of a minor child, and there have been consequences. Montaque, clearly the worst malefactor in these events, was convicted of statutory rape with Tiffany and is currently serving a ten-year sentence for that conduct, in addition to a life sentence for an unrelated murder. Ms. Jackson and her husband have been removed from DFCS' list of foster parents and are no longer entrusted with foster children in their home. Tiffany's mother, Priscilla Williams, as noted, has had her parental rights to Tiffany permanently terminated. DFCS, and the taxpayers who fund DFCS, now have another minor child on their rolls to support and care for.

Plaintiff, however, seeks one final consequence. Through a lawsuit brought by her biological mother,[18] plaintiff seeks to have her caseworker, Stacy Reed, pay the plaintiff money because the caseworker did not figure out that plaintiff was having clandestine sexual relations with Montaque Jackson. As discussed at length, because plaintiff has failed to show that this caseworker was deliberately indifferent to a threat posed to plaintiff, plaintiff cannot prevail in this effort to recover monetary damages from the caseworker.

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18. As noted *supra* at note 1, the Court is not certain under what authority Priscilla Williams acts for her daughter, as Priscilla's parental rights have been terminated. Nevertheless, this question can remain unanswered as the Court has ruled for the defendants in this case and Priscilla Williams will therefore have no opportunity to control any funds that might have been awarded to Tiffany as damages in this case.

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Therefore, the Court **GRANTS** Marion Jackson and John Hammonds' Motion for Summary Judgment [59]; **DENIES** defendants' Marion Jackson and John Hammonds' Request for Oral Argument [60]; **GRANTS** Consent Motion by Defendants Reed, Jenkins, and Elliot for Extension of Time in which to File Their Motion for Summary Judgment [66]; **DENIES** Defendants Marion Jackson and John Hammonds' Motion to Strike and Objections to the Affidavit of Dawn Tyus [67]; **GRANTS** Consent Motion to Drop Defendant Awaldi Elliot [71]; **GRANTS** Defendants Reed and Jenkins' Motion for Summary Judgment [80]; **GRANTS** Plaintiff's Motion to Drop Defendant Mary Jenkins [110]; and **DISMISSES** the abandoned claim brought against Montaque Jackson.[19]

The Clerk is directed to close this action.

SO ORDERED, this 30 day of August, 2005.

JULIE E. CARNES
UNITED STATES DISTRICT JUDGE

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19. See discussion *supra* at 11.

Supreme Court, U.S.
FILED
MAY 26 2006
OFFICE OF THE CLERK

No. 05-1380

In The
Supreme Court of the United States

TIFFANY WILLIAMS,

Petitioner,

v.

MARION JACKSON and JOHN HAMMONDS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether foster parents are acting under color of state law within the meaning of 42 U.S.C. § 1983.

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Sup. Ct. R. 10 6

BRIEF IN OPPOSITION

Respondents Marion Jackson and John Hammonds respectfully request that the Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

INTRODUCTION

Every circuit in the country that has decided this issue has found that foster parents are not state actors. *See Leshko v. Servis*, 423 F.3d 337, 347 (3d Cir. 2005); *Weller v. Dep't of Social Servs.*, 901 F.2d 387, 392 (4th Cir. 1990); *Milburn v. Ann Arundel County Dep't of Social Servs.*, 871 F.2d 474, 479 (4th Cir. 1989), *cert. denied*, 493 U.S. 850 (1989); *K.H. through Murphy v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990); *Rayburn v. Hogue*, 241 F.3d 1341 (11th Cir. 2001); *Marr v. Schofield*, 307 F. Supp. 2d 130, 134 (D. Me. 2004); *P.G. v. Ramsey County*, 141 F. Supp. 2d 1220, 1226 (D. Minn. 2001); *Walker v. Johnson*, 891 F. Supp. 1040, 1050 (M.D. Pa. 1995); *McCrum v. Elkhardt Dep't of Public Welfare*, 806 F. Supp. 203, 208 (N.D. Ind. 1992); *Lintz v. Skipski*, 807 F. Supp. 1299, 1307 (W.D. Mich. 1992); *Pfoltzer v. County of Fairfax*, 775 F. Supp. 874, 884 (E.D. Va. 1991); *compare*, *Howard v. Malac*, 270 F. Supp. 2d 132, 144 (D. Mass. 2003) (case only stated a claim based on allegation that state officials knew a foster parent was abusing a child and they colluded to cover up the abuse). Petitioner cannot and has not shown a split in the circuits, and has therefore failed to meet her burden. As a result, this case does not warrant further review.

The decision below is consistent with this Court's rulings in *West v. Atkins*, 487 U.S. 42 (1988) and *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001). In *West*, this Court found that a contract physician was a state actor because he was providing a mandatory state function – medical care to inmates. "[P]roviding hands-on care [to children] has never been, and is not now, an exclusively governmental function." *See Leshko*, 423 F.3d at 347; *Milburn*, 871 F.2d at 479; *Rayburn*, 241 F.3d at 1347; *Marr*, 307 F. Supp. 2d at 134; *Lintz*, 807 F. Supp. at 1306. In the eighteen years since *West* was decided no court has concluded that foster parents can be considered state actors based on its precedent. To the contrary, every court to consider *West* in analyzing whether foster parents are state actors has reached the same conclusion – that foster parents are not analogous to the physicians in *West* because they do not perform an exclusive governmental function in an institutional setting. *See, e.g., Leshko*, 423 F.3d at 347; *Marr*, 307 F. Supp. 2d at 135, n.2.

In *Brentwood Academy*, 531 U.S. 288 (2001), this Court found state action based upon "pervasive entwinement to the point of largely overlapping identity" between an nominally private athletic association and the State. There is no entwinement, pervasive or otherwise, between foster parents and the State. It has been well-established by this Court, as well as the lower courts, that the mere fact that a state provides funding, licensing, or regulation is insufficient to establish state action based on "pervasive entwinement" or any other theory of state action. *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 543-4 (1987); *Blum v. Yaretsky*,

457 U.S. 991, 1004 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-3 (1974); *see also, Milburn*, 871 F.2d at 477 (licensing and supervision of foster homes by state insufficient to render foster parents state actors); *Walker*, 891 F. Supp. at 1051 ("while it is true that foster parents are required to be licensed and are subject to state controls and receive state monies for the care of the children in their charge, these factors alone do not render them state actors"). The Circuit Courts of Appeals are in complete agreement that the mere extension of tort immunity to foster parents does not create a sufficient relationship with the State to convert foster parents into state actors. *Leshko*, 423 F.3d at 342-3; *Rayburn*, 241 F.3d at 1348. The critical issue is that the day-to-day decisions regarding supervision of foster children and other aspects of their care are handled entirely by foster parents within their private homes, therefore, it cannot be said that such decisions "may be fairly treated as [those] of the state itself." *See Brentwood*, 531 U.S. at 295. Accordingly, no court has concluded that foster parents are state actors based upon pervasive entwinement. *See, e.g., Leshko*, 423 F.3d at 340-1; *Marr*, 307 F. Supp. 2d at 1134; *P.G.*, 141 F. Supp. 2d at 1226.

42 U.S.C. § 1983 only provides a remedy for violations of federal rights by a person acting under color of state law. 42 U.S.C. § 1983. Section 1983 simply cannot provide a remedy for allegedly negligent conduct by private individuals. Petitioner has failed to meet her burden to provide a compelling reason why this Court should accept its petition for certiorari, as the Eleventh Circuit's decision is consistent with every circuit court of appeals and this Court's decisions in *West* and *Brentwood*.

STATEMENT OF THE CASE

In 1998, Marion Jackson and John Hammonds became foster parents and began caring for foster children such as Ms. Williams in their private home. As foster parents, they did not receive compensation for their services, although they did receive approximately $350.00 per month for the expenses of food, clothes, and board for the foster children. All day-to-day decisions regarding care and oversight of foster children in their private home were made solely by Jackson and Hammonds.

Their adult son, Montaque Jackson, did not live in their home when they were foster parents. He shared an apartment locally with his girlfriend, although he did visit his parents' home. Montaque did not have any prior conviction for sexual abuse as alleged by Petitioner, but was convicted of third degree menacing, a Class B misdemeanor, in Kings County, New York on January 28, 2000. Ms. Jackson had no idea that her son may have engaged in drug use until after his arrest for this matter and unrelated charges. Mr. Hammonds merely suspected that this was a possibility on two isolated occasions when he felt his son was not acting "normally."

Ms. Jackson emphasized that she would not tolerate inappropriate behavior from her foster children, and actually contacted the Georgia Division of Family and Children Services (DFACS) about her suspicion that Tiffany may have engaged in inappropriate behavior with her grandson on an occasion when he visited the home. A DFACS investigation concluded that the allegations were unsubstantiated.

However, during the time Ms. Williams was a foster child in the Jackson/Hammonds home, she secretly engaged in a physical relationship with Montaque Jackson

when he visited the residence. These encounters took place during late night hours when Ms. Jackson and Mr. Hammonds were asleep.[1] Ms. Williams never told Ms. Jackson, Mr. Hammonds, or her caseworker, Stacey Reed, about her sexual relationship with Montaque Jackson; they had no knowledge whatsoever of the sexual contact between Petitioner Williams and Montaque Jackson until Ms. Williams informed them she had become pregnant.

Petitioner Williams filed this action in the United States District Court for the Northern District of Georgia on March 25, 2004, seeking recovery pursuant to 42 U.S.C. § 1983 for an alleged deprivation of her Fourteenth Amendment substantive due process rights. Ms. Jackson and Mr. Hammonds filed their Motion for Summary Judgment on December 12, 2004, asserting that appellant could not prevail on her 42 U.S.C. § 1983 claims based upon the binding Eleventh Circuit precedent of *Rayburn v. Hogue*, 241 F.3d 1341 (11th Cir. 2001), a factually analogous case holding that foster parents are not state actors as a matter of law. On August 30, 2005, the district court granted Respondents' motion on the basis that *Rayburn* provided binding authority establishing that foster parents are not state actors as a matter of law, therefore they cannot be subject to liability under § 1983. The Motion for Summary Judgment filed by social worker Stacey Reed was granted based upon Ms. Williams' failure to provide any evidence of deliberate indifference by the social

[1] After Ms. Williams was returned to her mother's custody, she returned to the home of Ms. Jackson and Mr. Hammonds in June 2001 and again engaged in sexual relations with Montaque Jackson. It is unclear whether she became pregnant during the time she was in foster care or after she was returned to her mother's custody.

worker, and the district court dismissed Petitioner's claims against Montaque Jackson for failure to prosecute. Petitioner only appealed the district court's grant of summary judgment to respondents Jackson and Hammonds, and the dismissal of Montaque Jackson for failure to prosecute. The Eleventh Circuit affirmed the district court's ruling without an opinion on January 27, 2006.

REASONS FOR DENYING THE PETITION

Petitioner has failed to show that the decisions of the lower courts are in conflict with any decision of this Court or any United States Court of Appeals and the legal issue of whether foster parents are state actors is well-established, therefore, she has failed to carry the burden of demonstrating compelling reasons for the petition to be granted. Sup. Ct. R. 10.

I. THERE IS NO SPLIT IN THE CIRCUITS AS EVERY CIRCUIT COURT DECIDING THIS ISSUE HAS RULED CONSISTENTLY WITH THE ELEVENTH CIRCUIT COURT OF APPEALS.

A party seeking redress pursuant to 42 U.S.C. § 1983 must allege a deprivation of a right secured by the Constitution or laws of the United States by a person acting under color of state law. 42 U.S.C. § 1983. The primary issue in deciding whether a private party's actions constitute "state action" is whether the party's "conduct allegedly causing the deprivation of a federal right be fairly attributable to the State." *Lugar*, 457 U.S. at 937.

It is only under rare circumstances that a private entity may be considered a "state actor" for purposes of imposing liability pursuant to 42 U.S.C. § 1983. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961); *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992). "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law" and avoids the imposition of responsibility on a State for conduct it could not control. *Lugar*, 457 U.S. at 936-7.

Prior to ruling on the present case, the Eleventh Circuit had previously held in *Rayburn v. Hogue*, 241 F.3d 1341 (11th Cir. 2001), that foster parents were not state actors. The Eleventh Circuit concluded under the state compulsion and public function tests that there was no evidence that "the State encouraged the Hogues' actions, nor is foster care traditionally an exclusive [S]tate prerogative." *Id.* at 1347. The Rayburn court then evaluated whether "the State has so far insinuated itself into a position of interdependence with the [private parties] that it was a joint participant in the enterprise," noting that to find state action under this standard, "the governmental body and private party must be *intertwined* in a 'symbiotic relationship'" related to the specific conduct of which the plaintiff complains.[2] *Id.* at 1348. In accordance with this Court's decisions, the Eleventh Circuit concluded that mere government regulation of foster care was not sufficient to make foster parents state actors. *Id.* (citing *American Mfrs.*

[2] Although decided four days before this Court's decision in *Brentwood Academy*, the Eleventh Circuit in *Rayburn* clearly used a synonymous term for "entwinement" in evaluating whether private conduct constituted state action.

Mut. Ins. Co., 526 U.S. at 57; *Blum*, 457 U.S. at 1004). The *Rayburn* court also pointed out that mere inclusion of foster parents in the definition of "state employee" within the Georgia Tort Claims Act did not alter this conclusion, since merely extending governmental tort liability and immunity rules to foster parents creates a tenuous relationship between foster parents and the State, at best. *Id.* at 1349 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 527-8 (1985)). As there was no evidence that the State was a joint participant in the alleged child abuse, the Eleventh Circuit concluded that the Hogues were not state actors. *Id.* Based upon this binding precedent, the lower courts in this matter correctly held that Ms. Jackson and Mr. Hammonds were not state actors subject to liability pursuant to § 1983.

The Eleventh Circuit based its decision in this case on its holding in *Rayburn*. Virtually every other court to consider the issue has reached the same conclusion. *See, e.g., Leshko v. Servis*, 423 F.3d 337, 341, n.3 (3d Cir. 2005) (citing *Rayburn* with approval); *Weller v. Dep't of Social Servs.*, 901 F.2d 387, 392 (4th Cir. 1990); *Milburn v. Ann Arundel County Dep't of Social Servs.*, 871 F.2d 474, 479 (4th Cir. 1989), *cert. denied*, 493 U.S. 850 (1989); *K.H. through Murphy v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990); *Marr*, 307 F. Supp. 2d at 133-4. The only case in which a foster parent could be deemed a state actor is if there is evidence that state social workers had knowledge of abuse, and it is undisputed that there is no such evidence in this case. *See, e.g., K.H. through Murphy v. Morgan*, 914 F.2d at 852 (foster parent can only be considered a state actor when the state knows or suspects the foster parent is an abuser); *Howard*, 270 F. Supp. 2d at 144 (allegation that state officials knew a foster parent

was abusing a child and they colluded to cover up the abuse sufficient to state a claim under "nexus" or "entwinement" tests). As a result, Petitioner has failed to provide any compelling reason why this Court should grant the petition, as the lower court rulings in this matter are absolutely consistent with the rulings of every United States Court of Appeals on this issue.

II. THE ELEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS IN *WEST* AND *BRENTWOOD*.

West v. Atkins supports the Eleventh Circuit's decision in this case. *West* involved the delegation of a traditionally exclusive mandatory state function – provision of medical care to inmates – through a contract of employment with a physician. *West v. Atkins*, 487 U.S. 42, 51-2 (1988). This Court noted the physician in *West* functioned as the sole means of providing medical care to inmates. *Id.* at 54. This Court concluded that the physicians were vested with the authority to perform a *mandatory state function* and were state actors, regardless of the fact they were "independent contractors" rather than "state employees," and noted the importance of evaluating an individual's function rather than such labels in determining whether he is a state actor. *Id.* at 55-6; *see also*, *Brentwood Academy*, 531 U.S. at 296 (citing *West* and noting that "[w]e have treated a nominally private entity as a state actor . . . when it has been delegated a public function by the State").

This Court has held that in evaluating whether a private entity is performing a public function, "the question is whether the function performed has been 'traditionally the exclusive prerogative of the State.'" *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (*quoting Jackson*

v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974)). "While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978) (citing *Jackson*, 419 U.S. at 356). It is clearly established that foster care, unlike the provision of medical care to inmates, is not an exclusive state function, therefore this Court's ruling in *West* cannot convert foster parents into state actors. *See Leshko*, 423 F.3d at 347; *Milburn*, 871 F.2d at 479; *Rayburn*, 241 F.3d at 1347; *Marr*, 307 F. Supp. 2d at 134; *Lintz*, 807 F. Supp. at 1306. Furthermore, the provision of day-to-day care to foster children in a private residence is not analogous to the provision of medical care to inmates. *Leshko*, 423 F.3d at 346 ("[i]t is fair to say that a primary goal of foster care is to replicate as closely as possible the traditional family setting in which children are cared for and raised" "whereas in West the tight security-based strictures of prison life affected the 'nature, timing, and form of medical care provided to inmates'"). "Foster homes operated by private citizens are not comparable to state institutions that might more accurately be characterized by the terms 'incarceration' and 'institutionalization.'" *Pfoltzer*, 775 F. Supp. at 885, n.2.

In the 18 years since *West* was decided, not one of the numerous federal courts that have analyzed whether foster parents are state actors has concluded that *West* converts these private citizens into state actors. *See Leshko v. Servis*, 423 F.3d 337, 347 (3d Cir. 2005); *Weller v. Dep't of Social Servs.*, 901 F.2d 387, 392 (4th Cir. 1990); *Milburn v. Ann Arundel County Dep't of Social Servs.*, 871 F.2d 474, 479 (4th Cir. 1989), *cert. denied*, 493 U.S. 850 (1989); *K.H. through Murphy v. Morgan*, 914 F.2d 846, 852

(7th Cir. 1990); *Rayburn v. Hogue*, 241 F.3d 1341 (11th Cir. 2001); *Marr v. Schofield*, 307 F. Supp. 2d 130, 134 (D. Me. 2004); *P.G. v. Ramsey County*, 141 F. Supp. 2d 1220, 1226 (D. Minn. 2001); *Walker v. Johnson*, 891 F. Supp. 1040, 1050 (M.D. Pa. 1995); *McCrum v. Elkhardt Dep't of Public Welfare*, 806 F. Supp. 203, 208 (N.D. Ind. 1992); *Lintz v. Skipski*, 807 F. Supp. 1299, 1307 (W.D. Mich. 1992); *Pfoltzer v. County of Fairfax*, 775 F. Supp. 874, 884 (E.D. Va. 1991). In fact, every court to apply *West* to this issue has specifically rejected the argument raised by Petitioner. *Leshko*, 423 F.3d at 347; *Marr*, 307 F. Supp. 2d at 135, n.2. Recently, the Third Circuit specifically analyzed *West* and concluded that "providing hands-on care [to children] has never been, and is not now, an exclusively governmental function." *Leshko*, 423 F.3d at 344. The *Leshko* court specifically distinguished *West*, noting "'the power that a state exercises over a person whose liberty is restricted as a result of a criminal conviction or involuntary civil commitment' 'is quintessentially governmental, but a legal guardian's authority over a minor is not.'" *Id.* at 347 (*quoting Robert S. v. Stetson School, Inc.*, 256 F.3d 159, 162 (3d Cir. 2001)). Clearly, the Eleventh Circuit's decision in this case is consistent with this Court's ruling in *West v. Atkins*.

Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001) also supports the decision of the Eleventh Circuit. In *Brentwood Academy*, this Court employed a fact-intensive analysis in concluding that the relationship between the State and a nominally private athletic association "show[ed] pervasive entwinement to the point of largely overlapping identity." *Id.* at 303. In reaching this conclusion, this Court noted that 84 percent of the association's membership consisted of public school

officials, acting in their official capacity and performing all but the purely ministerial acts by which the Association existed and functioned, therefore this Court found regulatory action by the association constituted state action. *Id.* at 299-300. However, this Court noted that "state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the state itself.'" *Id.* at 295.

This Court's ruling in *Brentwood Academy* supports the conclusion that Respondents were not state actors, as there is no entwinement, pervasive or otherwise, between foster parents and the State. Petitioner contends that State regulation and oversight of foster care constitutes "pervasive entwinement" sufficient to render foster parents state actors. However, this Court and the lower courts have repeatedly made it clear that mere funding, licensing, or regulation of an individual or entity alone is insufficient for a finding of state action. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 543-4 (1987); *Mentavlos v. Anderson*, 249 F.3d 301, 320 (4th Cir. 2001); *see also, Blum*, 457 U.S. at 1004 (mere fact that an individual is "subject to state regulation does not by itself convert its action into that of the State."); *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 353 (conduct by a private entity is not state action just because subject to state regulation or business "affected with the public interest."); *Milburn*, 871 F.2d at 477 (licensing and supervision of foster homes by state insufficient to render foster parents state actors); *Walker*, 891 F. Supp. at 1051 ("while it is true that foster parents are required to be licensed and are subject to state controls and receive state monies for the care of the children in their charge, these

factors alone do not render them state actors"). "Action taken by private entities with the mere approval or acquiescence of the State is not state action." *American Mfrs. Mut. Ins. Co.*, 526 U.S. at 52. Furthermore, every Circuit to address the issue has consistently found that the mere extension of tort immunity is insufficient to render foster parents state actors. *Leshko*, 423 F.3d at 342-3 (although foster parents are defined as public employees for purposes of being granted immunity under the state tort claims act, such labels alone are not dispositive for determining whether an individual is a state actor; instead it is essential to look to the function the individual serves in determining whether there is state action); *Rayburn*, 241 F.3d at 1318.

The specific arguments raised by Petitioner have been consistently rejected by every court to address the issue, all of which have found that foster parents are not state actors based upon the "pervasive entwinement" analysis of *Brentwood*. *Leshko v. Servis*, 423 F.3d 337, 340-1 (3d Cir. 2005) (regulation and oversight of foster care and designation of foster parents as public employees for purposes of immunity insufficient to establish entwinement such that "the state's fingerprints" are on the challenged conduct); *Marr v. Schofield*, 307 F. Supp. 2d 130, 133-5 (D. Me. 2004) (fact that foster care is created by state statutes and regulations, foster parents received payments from the state, and they are governed by rules and regulations promulgated and enforced by the Department of Human Services insufficient to render state actors under any state action analysis, including "entwinement" analysis); *P.G. v. Ramsey County*, 141 F. Supp. 2d 1220 (D. Minn. 2001) (finding it clear that foster parents do not act under color of state law). As a result, the holding of the Eleventh

Circuit is consistent with the binding precedent of this Court and certiorari should not be granted.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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